

## PUBLIC TIMBER PURCHASERS GROUP

IBLA 82-1018

Decided August 17, 1982

Appeal from announcement by the Oregon State Office, Bureau of Land Management concerning the triggering of the small business set-aside timber sale program in the Coos Bay, Oregon, District.

Dismissed.

### 1. Appeals--Timber Sales and Disposals

Where an appeal of a Bureau of Land Management action regarding the triggering of a small business set-aside timber sale program raises only class size issues, the appeal must be dismissed because the Small Business Administration, not the Department of the Interior, determines class size.

APPEARANCES: John K. Gram, president, Public Timber Purchasers Group, for appellant; William G. Leavell, Oregon State Director, Bureau of Land Management, for the Bureau of Land Management; Robert E. Ragon, president, Lone Rock Timber Company, for intervenor, Lone Rock Timber Company; Leonard B. Netzorg, Esq., for intervenor, Western Forest Industries Association.

### OPINION BY ADMINISTRATIVE JUDGE HARRIS

Public Timber Purchasers Group (PTPG) has appealed the announcement of the Associate State Director, Oregon State Office, Bureau of Land Management (BLM), concerning the triggering of the small business set-aside timber sale program in the Coos Bay, Oregon, District. BLM has responded requesting that the appeal be dismissed. 1/

Both Lone Rock Timber Company and Western Forest Industries Association (WFIA) have sought intervention. Each is opposed to PTPG's appeal. Since each intervenor, in addition to setting forth its interest in the set-aside program and why its interest is or may be adversely affected, also stated its

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1/ On Aug. 9, 1982, BLM filed a document with the Board requesting that the Board place the small business set-aside program for the Coos Bay District in immediate full force and effect pursuant to 43 CFR 4.21(a). BLM explained the economic consequences of delaying the program. Rather than acting on this request, we have given expedited consideration to the appeal.

reasons for opposing the appeal, the requests for intervention are granted, and we will consider their arguments.

BLM explained the history of the small business set-aside program as follows:

Authority for the small business set-aside timber sale program is contained in the Small Business Act of 1958 [15 U.S.C. §§ 631-647 (1976)] which expresses the policy that a fair proportion of the total sales of Government property be made to small business concerns in order to preserve free competitive enterprise. Section 15 of the Act [15 U.S.C. § 644 (1976)] provides that small business concerns shall be awarded any contract for the sale of Government property determined by the Small Business Administration (SBA) and the disposal agency to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns under this authority.

The SBA is responsible for establishing criteria to determine what are small businesses for purposes of the programs authorized by the Act. The current SBA standard relevant to the Federal timber sale set-aside program is 500 employees or less.

The Bureau of Land Management (BLM) and SBA entered into a Memorandum of Understanding on March 10, 1959, which established the basic framework for a small business set-aside timber sale program from lands under the jurisdiction of the Bureau in western Oregon. (See Attachment 1)

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In 1972, the BLM and SBA developed procedures for the set-aside timber sale program similar to 1971 procedures agreed upon by the Forest Service and SBA. Thus, both major Federal timber management agencies in western Oregon operate the program in a similar manner.

Following review by the public and the timber industry of these proposals, the BLM and SBA agreed upon operational procedures involving:

- computation of average small business percentages of timber acquired during a five-year "historical" base period;
- analysis of subsequent sales activity; and
- determination of the need for set-asides by use of a "triggering formula".

These new procedures were implemented in western Oregon on January 1, 1974, and are presently confined to that area. After two years of operation, the new program was reviewed at the end of 1975. As a result, several additional revisions were made in 1976 to improve the Bureau's ability to manage and operate the

program. These include converting from a calendar year to a fiscal year basis, changing the analysis period from 12 months to 6 months and developing a policy for use of roads owned and controlled by large business concerns. (See Attachments 2a-2d)

(BLM Response at 1-2).

Set-asides are triggered when analysis shows that small business concerns have failed to purchase their share by 10 percent or more. Analysis involves monitoring sales and charging each sale as it is bought either to large or small business. Class size of the purchaser is exclusively a determination for SBA.

PTPG is appealing the triggering of the set-aside program in the Coos Bay, Oregon, District for the 6-month period following March 31, 1981. PTPG asserts that Reservation Ranch should have been classified as a small business rather than a large business when it purchased a volume of lumber in the Coos Bay District on January 29, 1982. PTPG maintains that if that sale had been credited to small business rather than large business, the set-aside program would not have been triggered for the 6-month period, April 1 to September 30, 1982.

In essence PTPG is challenging the SBA classification of Reservation Ranch as a small business. Appellant argues that at the time Reservation Ranch made its January 1981 purchase, which was credited to large business, it was in the process of seeking recertification from the SBA as a small business. PTPG contends that, therefore, there was a "false" trigger of the set-aside program, and that a set-aside program is inconsistent with the program requirements of BLM or contrary to interests of sound sales policies (Statement of Reasons at 6).

[1] As pointed out by WFIA, appellant has approached SBA and sought reallocation of the January 1981 sale from large business to small business and cancellation of the set-aside program. SBA has declined to take such action. 2/ Appellant's appeal to this Board presents the same issues.

2/ WFIA provided copies of correspondence between appellant and SBA officials in Oregon and Washington, D.C. That correspondence was attached as exhibits to its request for intervention. Relevant portions of those letters are as follows:

1. Letter from PTPG to SBA, Portland, Oregon, dated May 5, 1982 (Exh. A):

"It is the historical SBA position that a company's size classification is changed at the time of initial discussion or the start of negotiations. This precedent can be illustrated by any number of SBA decisions that the size status change is not just effective when the "papers are signed" but at the very beginning of the process which eventually results in a size classification change.

"It is the specific request of the Public Timber Purchasers Group that the 6,972. MBF volume from the January 29, 1982 South Elk Sale volume allocation be changed from large business to small business and that SBA immediately request cancellation of the April 20, 1982 Joint Set-Aside for Small Business with the Coos Bay BLM District."

Therefore, appellant is, in effect, requesting that this Board determine whether and when Reservation Ranch became a small business. The Board has no authority to make such a determination. It is the SBA, not the Department of the Interior, that determines class size. 3/ An appeal to this Board based

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fn. 2 (continued)

Letter from SBA, Portland, Oregon, to PTPG dated May 18, 1982 (Exh. B):

"A firm may request the SBA Regional Office of the area in which it is headquartered for a recertification of its size status, whenever it feels a significant change in its size status has occurred (see [13 CFR] 121.3-4). When such a recertification is completed, it becomes effective immediately as of the date of signature, and remains in force unless and until reversed by the SBA Size Appeals Board pursuant to [13 CFR] 121.3-6. In the subject case of your letter, Reservation Ranch was classified a large-category firm, but following a request for recertification the SBA Regional Office in San Francisco reclassified the firm small on April 1, 1982, which became effective on that date.

\* \* \* \* \*

"As you know, the Federal Timber Set-Aside Program is jointly-administered by SBA and the timber administering agencies, according to the Small Business Act, interagency agreements, regulations, and instructions. These were followed by the BLM and SBA in the subject case. Therefore, the specific request by PTPG to cancel the current set-aside program on the Coos Bay BLM District appears unwarranted from the viewpoint of SBA."

3. Letter from PTPG to SBA, Washington, D.C., dated May 24, 1982 (Exh. C):

"The Public Timber Purchasers Group (PTPG) respectfully asks your review of the decision, submitted by May 18, 1982 letter, of Industrial Specialist (Forestry) Ben A. Huey that the May 5, 1982 letter request by PTPG to cancel the current set-aside program on the Coos Bay BLM District "appears unwarranted from the viewpoint of SBA." Photocopies of the May 5 and May 18 letters are enclosed.

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"In a situation like this it would appear the prudent action of a government agency would be that, because of the circumstances, the Reservation Ranch purchase of the South Elk Sale, while they were receiving the advice of SBA on how to become "small", should be relocated from the large purchase category and credited to small purchases and that the scheduled set-aside program should be cancelled for the six-month period April 1 through September 30, 1982."

PTPG specifically stated in this letter that it was not challenging Reservation Ranch's size classification before the SBA Size Appeals Board.

4. Letter to PTPG from SBA, Washington, D.C., dated June 9, 1982 (Exh. D): "My review indicated that Mr. Huey's letter of May 18, 1982 correctly outlined the Small Business Administration's regulations and procedures that were applicable in this matter. I concur with his conclusion that the set aside at Coos Bay is appropriate."

3/ The set aside is to be made for the benefit of "small business enterprises as defined by SBA" (BLM/SBA Memorandum of Understanding, Mar. 10, 1959, para. 1). Eligibility is to be based on a determination by SBA that a firm "qualifies as a small business enterprise as defined by the SBA" (July 25, 1966, amendment to BLM/SBA Memorandum of Understanding, Mar. 10, 1959).

on an SBA class size determination must be dismissed. In this case as PTPG's appeal raises only class size issues, it must be dismissed.

BLM acted properly in going forward with the small business set-aside program.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Bruce R. Harris  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Melvin J. Mirkin  
Administrative Judge  
Alternate Member

